the proper proceeding in such a case is to challenge the jurisdiction in an Affidavit of Defense.

On principle today it would seem that the rule of conclusiveness of the sheriff's return has outworn its usefulness, and remains in force in a few states only because of the conservatism of the law. This conclusion has been reached by many judges and legal writers. It seems to have been the thought in 1918 of Justice Kephart (then of the Superior, but now of the Pennsylvania Supreme Court), when he wrote in deciding a case[23] under the rule: "It is unnecessary for us to discuss the reasons for this rule. Until the Supreme Court of the legislature change or modify the rule, it must continue to be the law governing the effect of a sheriff's return regular on its face." This quotation is given by Justice Walling in one[24] of the recent cases considered, in which the Supreme Court follows the rule. From these cases it is apparent that the Supreme Court itself is unwilling to make the desired change. The conclusion which seems reasonable is that the time has come for the legislature of the state to take action.

R. D.

THE USE OF CONTRACTS OF GUARANTY BY COMMERCIAL CORPORATIONS IN FURTHERANCE OF CORPORATE BUSINESS.—Any discussion of the doctrine of *ultra vires* in its relation to contracts of guaranty made by one commercial corporation on behalf of another, is met at the outset with the necessity for a definition of terms. There is perhaps no portion of the law of private corporations which is so settled in its basic principle, and yet so strikingly fugitive in its application by the court in the particular cases presented to it. *Ultra vires* in its proper conception is the modern nomenclature for acts of a corporation which exceed or are beyond the powers conferred by law upon the legal entity, acting through any of its instrumentalities.[1] It does not properly concern itself with the authority of corporate agents as marked out by the corporation, nor with the power of the majority interest to act without the consent of the minority, nor with the liability of the corporation which, having received the benefits of a contract, pleads *ultra vires* in defense. Much confusion in the signification of *ultra vires* has resulted from its judicial misapplication. Fundamentally, it concerns itself only with the question of the power of the corporation to act in the particular instance.

The modern commercial corporation is a creature of statute. It acts only by and through the authority vested in it by its charter. It has no natural or inherent rights or capacities. The charter of a corporation, read in the light of the general laws which are

[23]Keystone Telephone Co. v. Diggs, 69 Pa. Super. Ct. 299 (1918) at page 301.

[24]Frank P. Miller Paper Co. v. Keystone Coal & Coke Co., *supra.*

[1]Pomeroy Specific Performance, par. 56; Reese, Ultra Vires, p. 26.

applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental.[2] In addition to the powers expressly conferred, the corporation possesses such powers as are necessary to carry into effect the objects, and purposes of the incorporation[3] and "necessary" means in this connection "suitable and proper" in view of the corporate purpose.[4]

As to the relation of *ultra vires* to contracts of guaranty, the rule is generally stated to the effect that ordinarily in the absence of express authority a corporation has no implied power to enter into a contract as guarantor and thus lend its credit to another corporation or person, unless directly in furtherance of its legitimate business.[5] Such a definition would naturally lead to a conception that a contract of guaranty, from the mere fact that it is a guaranty, is a species of contract foreign to corporate purposes. It is submitted that this is a misapprehension of the nature of a guaranty. A guaranty is merely one method of bargaining for an economic advantage. Instead of making a present transfer of its property in return for this advantage, the corporation in employing it undertakes a conditional liability. Provided the corporation is bargaining directly for an advantage allowable under its charter powers, the fact that a guaranty is made in the course of the transaction would seem immaterial. In short, the contract of guaranty made in connection with the bargain is ancillary thereto, and does not involve the execution of a separate power.[6] As a contract of guaranty, by a corporation, *ex vi termini*, is inevitably linked up with the undertakings and financial stability of another person or corporation, it is natural for some confusion of thought to have developed on the subject.

In light of the above mentioned principles, the recent decision of the California Supreme Court in the case of Woods Lumber Co. v. Moore[7] gives a new interpretation of the powers of corporations

[2]Central Transportation Co. v. Pullman Palace Car Co. 139 U. S. 24 (1890).

[3]Green Bay etc. R. Co. v. Union Steamboat Co. 107 U. S. 98 (1882); General Investment Co. v. Bethlehem Steel Corp. 248 Fed. 303, 310 (1918); State of New Jersey v. Atlantic etc. R. Co. 77 N. J. L. 465, 72 Atl. 111 (1909).

[4]3 Thompson Corporations, sec. 2110; Pullman Palace Car Co. v. People, 175 Ill. 125 (1898); Malone v. Lancaster Gas. Co. 182 Pa. 309 (1897); Northside Ry. Co. v. Worthington, 88 Tex. 562, 30 S. W. 1055 (1895).

[5]2 Fletcher Corporations, p. 1869; Penna. R. Co. v. St. Louis etc. R. Co. 118 U. S. 290 (1886); Humboldt Mining Co. v. American Mfg. etc. Co. 62 Fed. 356 (1894); Bank of Memphis v. Towner, 239 Fed. 433 (1917); Lucas v. White Line Transfer Co. 70 Iowa 541, 30 N. W. 771 (1886); Davis v. Old Colony R. Co. 131 Mass. 258 (1881); Coleman v. Eastern Counties Ry. Co. 10 Beav. 1 (1849).

[6]In an early discussion of corporation guaranties, a writer in 25 American Law Reg. 513 (1877) views such contracts as "insidious in their nature, and more likely to be entered into, without due consideration than an absolute agreement to pay." The view expressed the opinion that the exercise of the right to guarantee, is the exercise of an independent corporate power. *Cf.* Article of C. B. Labatt in 31 American Law Rev. 363.

[7]191 Pac. 905 (1920).

in the employment of guaranty contracts. The defendant corporation, organized under the laws of California, by its charter was empowered to make films for moving picture plays, to exhibit them to the public, to build structures for the purpose of making such films, and to manufacture, sell and deal in all kinds of goods, wares and merchandise. Its principal business was that of selling and renting costumes for theatrical and moving picture productions. It was under contract to furnish the Continental Producing Company with costumes for use in a particular picture which the latter was about to produce. The Producing Company needed lumber for the scenery, but being in poor financial standing was unable to get it from the plaintiff. On the defendant's guaranty that the Producing Company would pay for the lumber furnished it, the plaintiff delivered the lumber, and on default of the Producing Company sued the guarantor. The court held the latter corporation liable on the theory that the corporation had implied power to make the contract of guaranty for the reason that it tended "directly" to promote its business by securing to it the anticipated fruits of an executory contract—an advantage which surely would have been lost had the guaranty not been made. The case was further complicated by the fact that one Goldstein was the principal stockholder in both the defendant corporation and the Producing Company. The court, however, placed no stress on this fact.

An analysis of the opinion would lead to the view that the court in regarding the guaranty as "directly related" to the authorized business was influenced by the theory that it tended to increase the guarantor's business and secure to it the advantages under a contract still to be executed. The court recognized the fact that a contract of guaranty "not directly" connected with or beneficial to the authorized business of a corporation would be *ultra vires*, but it held the contract in the instant case to be not within that category. No test is given as to what is this necessary "direct relation" other than the enhancing of the business of the guarantor, nor do the cases cited in support of the opinion throw any light on the subject. If contemplated gain in business is the measure of corporate power, it would seem that the case represents a departure in the field of corporation law. An extended discussion of the cases on the general subject of corporation guaranties is not the purpose of the present note, but the following classification suggested as bearing on the case under discussion makes it apparent that the court has, at the expense perhaps of reaching a just conclusion, extended the rule as laid down in previous decisions.

I. The cases are in accord in holding that when from the character of the business it is necessary for its prosecution that another instrumentality be employed by the corporation, a power will be implied to guarantee the obligations of this other instrumentality which is engaged in making the guarantor's business

possible. For example, a saw mill corporation owning a tract of timber land, inaccessible unless reached by a new railroad, was held to have implied power to guarantee the bonds of a railroad corporation organized to serve the timber tract.[8] So a corporation organized to purchase and sell letters patent pertaining to the manufacture of asphalt blocks, could guarantee to a foreign corporation supplying asphalt to the guarantor's licensees, the payment for these shipments. Without the guaranty the licensees could not secure any of the necessary product.[9]

II. Furthermore, the decisions have recognized the implied power to give a guaranty in lieu of purchase price or as a part of the purchase price for property which the guarantor corporation has been authorized to acquire under its charter,[10] and it is well settled that bonds or notes which a corporation receives in course of business may be disposed of by indorsement and guaranty, since the added security of the corporation's guaranty directly adds value to the instrument, and facilitates its disposal by the guarantor corporation.[11]

III. A corporation may guarantee the obligations of another corporation or person when the business of the latter is of a nature which the guarantor corporation could itself carry on under its charter, and which it would so engage in were it not an economic advantage, measured by good business practice, to depend on other agencies for the furtherance of this portion of its business. The decisions in this connection group themselves in the main about guaranties of rent or license fees executed by brewing companies to aid customers who were marketing their products in the retail trade.[12] These cases perhaps, represent the principle in its entirety.

IV. A corporation which has extended credit to a customer may, in order to protect its debt by keeping the latter in business,

[8] Mercantile Trust Co. v. Kiser, 91 Ga. 636, 18 S. E. 358 (1893); Marbury v. Union Land Co., 62 Fed. 335 (1894); Cunningham Hardware Co. v. Gama Transportation Co., 58 So. 740 (1912); *semble* Whitehead v. American Lamp and Brass Co., 70 N. J. Eq. 581, 62 Atl. 554 (1905).

[9] Edwards v. International Pavement Company, 227 Mass. 206, 116 N. E. 266 (1917).

[10] Eastern Township Bank v. R. Co. 40 Fed. 423 (1889); Marbury v. Union Land Co. 62 Fed. 335 (1894); (*semble*) Vandeveer v. Asbury Park R. Co. 82 Fed. 355 (1897); General Investment Company v. Bethlehem Steel Corp. 248 Fed. 303 (1918); Low v. Central Pac. R. Co. 52 Cal. 53 (1877); Ellerman v. Chgo. R. Co. 49 N. J. Eq. 217, 23 Atl. 287 (1891).

[11] Fidelity Trust Co. v. Louisville Gas Co. 118 Ky. 588, 81 S. W. 927 (1904); Thomas v. Nat. Bank of Hastings, 40 Neb. 501, 58 N. W. 743 (1894). Note 11 Ann. Cases 893.

[12] Miller v. Northern Brewing Co. 242 Fed. 164 (1917); Hagerstown Brewing Co. v. Gates, 117 Md. 348, 83 Atl. 570 (1912); Timm v. Grand Rapids Brewing Co. 160 Mich. 371, 125 N. W. 357 (1910), 27 L. R. A. (N.S.) 186; Koehler & Co. v. Reinheimer, 26 App. Div. 1 (N. Y. 1898); Realty Syndicate v. Enterprise Brewing Co. 170 Pac. (Ore.) 294 (1918), L. R. A. 1918 C. p. 1001; Wenterfield v. Brewing Co. 96 Wis. 239, 71 N. W. 101 (1897); Cf. Interior Woodwork Co. v. Prasser, 108 Wis. 557 (1901).

guarantee the customer's obligations to third parties who on the strength of this guaranty furnish the customer with the needed materials.[13] The relation of the guaranty to the business of the guarantor corporation in these cases is clear, as the corporation, like an individual, should have the power to protect its outstanding accounts, and thus directly to foster its own legitimate business.

V. A corporation possesses no implied power to lend its credit in the form of a guaranty merely because business might thereby be induced or increased.[14] These cases bring up the right of a corporation, organized for a specified purpose, to further the interests of a business which it is not authorized to conduct, but from which it expects profits in the way of custom and trade. Thus, a corporation organized to sell iron parts for mining plants, could not guarantee a building contract of a corporation organized to build such plants, even though by means of its guaranty the former corporation sold its product to the building corporation;[15] a lumber corporation acted *ultra vires* in guaranteeing performance of a building contract by a contractor to whom it was to sell the necessary material;[16] a railroad corporation, or a company organized for the manufacture of musical instruments could not guarantee the payment of the expenses of a festival, although the holding of the festival promised to increase business;[17] nor could a corporation organized to manufacture brick guarantee to save a house owner harmless from mechanic's liens, though in so doing it was enabled to sell its product to the contractor.[18] These cases represent cogent authority for the principle that the implied power to guarantee does not depend upon the probability of substantial gain to the guarantor's business. The theory upon which they

[13]Hess v. Sloane, 66 App. Div. 522 (N. Y. 1901); aff. 173 N. Y. 616 (1903) in which a corporation having sold furniture etc. to a hotel was held on its contract to save harmless a third party who on faith of the contract went as accommodation indorser on the note of the hotel, thus furnishing capital with which to run the business; Armour & Co. v. Rosenberg & Sons, 173 Pac. 404 (1918) in which a corporation organized to manufacture and sell bottles was held liable on guaranty of a customer's account for salad oil with a packing company which sold the oil, the guaranty being made to keep the customer in business; acc. Cudahy Packing Co. v. Rosenberg & Sons, 173 Pac. 406 (1918).

[14]Green's Brice's Ultra Vires, sec. 88.

[15]Humboldt Mining Co. v. American Mfg. etc. Co. 62 Fed. 356 (1894).

[16]In re Smith Lumber Co. 132 Fed. 620 (1904). *Contra*, Central Lumber Co. v. Kelter, 201 Ill. 503 (1903).

[17]Davis v. Old Colony R. Co. 131 Mass. 258 (1881); (*semble*) Western Md. R. Co. v. Blue Ridge Hotel Co. 102 Md. 307, 62 Atl. 351 (1905), 2 L. R. A. (N. S.) 892; Elevator Co. v. Memphis R. Co. 85 Tenn. 703, 5 S. W. 52 (1887); Northside Ry. Co. v. Worthington, 88 Tex. 562, 30 S. W. 1055 (1895), Madison Plank Road Co. v. Watertown Plank Road Co. 7 Wis., 59 (1859); Coleman v. Eastern Counties Ry. Co. 10 Beav. 1 (1849).

[18]Hoosier Brick Co. v. Floyd County Bank, 116 N. E. 87 (1917). The decision in this case, however, allowed a recovery on the theory that since the plaintiff acted on faith of the guaranty, the defendant was estopped to plead *ultra vires*. Cf. Kellogg Mackay Co. v. Havre Hotel Co. 199 Fed. 727 (1912); Flint Mfg. Co. v. Kerr Murray Mfg. Co. 24 Ind. App. 350, 56 N. E. 858 (1900).

rest has been perhaps most aptly stated by Judge Taft in the case of Humboldt Mining Co. v. American Mfg. etc. Co. *supra* when he said "The objection to the guaranty is that it risks the funds of the company in a different enterprise and business under the control of another and different person or corporation, contrary to what its stockholders, its creditors and the State have the right from the charter to expect."

In view of these authorities it is difficult to find justification for the decision of the instant California case to the effect that the guaranty was valid due to the fact that it "directly" tended to further the authorized business of the guarantor corporation. The cases cited in the opinion with one exception all fall within the recognized rule established by the courts upholding the validity of guaranties by brewing companies in aid of their retailers. The argument that the business of renting costumes is "directly" furthered is advanced in the face of the authority of the cases discussed above under Class V. The reasoning of the decision would seem to attach little importance to the necessity of reading a corporation's powers in light of its charter and the general law, so as to protect the rights of stockholders and creditors, and secure the performance on one side of the obligations raised by the grant of power from the State.

That a like result would be reached by the application of other principles is highly probable. In one sense it might be arguable that as the defendant corporation was by its own charter expressly authorized to engage in moving picture productions, it was therefore merely using the Producing Company as an agent to carry out this phase of its charter power. There is no intimation of this view, however, in the opinion. Furthermore, in many states, as in California, the plea of *ultra vires* would be of no avail under the facts of the present case as the defendant corporation would be estopped to allege its want of power, since the contract had been executed on the part of the party receiving the guaranty. While not a logical holding, such a result would be reached by the majority of State decisions.[19] There is a tendency in this field of corporation law, as well as in the interpretation of regulating statutes, to get away from the strict application of the principle of *ultra vires*, which developing largely in the 19th Century appears to have been most rigorously applied in periods of our commercial history when corporate organization and reorganization played fast and loose with the rights of competitors and the public at large. The present case may show a determination on the part of the court to reach directly what it would be forced to decide indirectly under the principle of an estoppel. It opens up the question raised years ago under different circumstances, "To what purpose are powers limited, if these limits may at any time be passed

[19]Valuable notes on the state of the law in this respect are available in 23 Harvard L. R. 495 and 24 Harvard L. R. 534.

by those intended to be restrained?" The case is doubtful on principle and authority.

J. R. Jr.

THE ACTION FOR LOSS OF SERVICES AND THE MEASURE OF DAMAGES TO BE APPLIED.—If a servant is injured by a third party, the result being that his service to his master is interrupted, the master has an action "*per quod servitium amisit*" even though the third party did not thereby intend to injure the master.[1] The master's right of action was originally based on his right to the services by virtue of the relation of master and servant and not his right as contractor to enjoy the benefit of the performance of a contract which bound the servant to render such service. This right seems to be a relic of the time when the family was the important legal unit, the rights of which were centered in and enforced and vindicated by its head, the father. His right to recover for an injury to his son or daughter was based on the injury to him in the form of loss of service and the flimsiest evidence of service, or even of the right thereto, was held to be sufficient to establish this injury.[2] In other words the relation of master and servant had to exist.

In the earlier cases the servant was always a son, a daughter, a wife, or a domestic servant, apprentice, or a laborer within the terms of the Statute of Laborers,[3] each of whom after all was at least a member of the master's immediate, trade or business family. In 1795, Chief Justice Eyre nonsuited a plaintiff who alleged that an opera singer employed by him had been assaulted by the defendant whereby the plaintiff lost his services, observing that "if the present action could be supported, every man, whose servant, whether domestic or not, was kept away a day from his business, could maintain an action."[4] In an early South Carolina case, the court restricted the right to the case of domestic servants, refusing to permit recovery for injury to a farm laborer who worked on shares,[5] and though this case was disapproved later on another ground,[6] it may be pointed out that not only were farm laborers originally villeins attached to the soil, but that they were the very class to which the Statute of Laborers was particularly applicable.

As has been stated above the right of action is derived from the relation of master and servant and in no wise depends upon interference with the contract of employment. Indeed it is the

[1]Robert Mary's Case, 9 Coke 111b (Eng. 1613); Ames v. Union Railway Co., 117 Mass. 541, 19 Am. Rep. 426 (1875).

[2]Jones v. Brown, 1 Esp. 217 (Eng. 1794); Kennedy v. Shea, 110 Mass. 147, 14 Am. Rep. 584 (1872).

[3]"Statute of Labourers," 23 Edw. III.

[4]Taylor v. Neri, 1 Esp. 386 (Eng. 1795).

[5]Burgess v. Carpenter, 2 S. C. 7, 16 Am. Rep. 643 (1870).

[6]Daniel v. Swearengen, 6 S. C. 297, 24 Am. Rep. 471 (1875); Huff v. Watkins, 15 S. C. 82, 40 Am. Rep. 680 (1880).